IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 292.

ROBERT L. CULPEPPER, PETITIONER,

vs.

JAMES M. OCHELTREE, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF ON BEHALF OF PETITIONER.

The Facts.

The quarter-section of land involved in this case was entered as a homestead in February, 1903, by one Danforth Arnold (R., p. 2), but in September, 1903, was withdrawn under the first form of the Reclamation Act of June 17, 1902

(32 Stat., 388), and remained so withdrawn for nearly seven years thereafter (R., pp. 2, 3).

During this time, and on June 6, 1905, the Interior Department provided by instructions (33 Land Decisions, 607, 609) that:

> "Any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry" (R., p. 24).

In January, 1908, James M. Ocheltree, respondent herein, contested the Arnold entry and through such contest secured its cancellation on September 30, 1908 (R., pp. 2, 3).

On January 13, 1909, the local officers notified Ocheltree of the cancellation of the Arnold entry and that he would be allowed a period of thirty days after the restoration of the land within which to exercise a preference right (R., p. 3).

A few days later, to wit, on January 19, 1909, the Interior Department issued the following General Instructions (37 Land Decisions, 365) in lieu of that above quoted, namely:

> "No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto,* terminate all right that was acquired by reason of such contest" (R., p. 14).

In January, 1910, the Secretary of the Interior directed restoration of this tract and other lands to public settlement

on April 18, 1910, and to public entry on May 18, 1910 (R., p. 3). On the date first mentioned, Robert L. Culpepper, who was fully possessed of all homestead qualifications, established settlement and actual residence upon the said quarter-section, and on May 18, 1910, filed proper homestead application (R., p. 3). Later the same day Ocheltree filed homestead application without asserting any settlement right, but relying wholly on his alleged contestant's preference right (R., pp. 3, 4).

In the controversy which ensued from the filing of these conflicting applications, decisions were rendered by the different bureaus of the Interior Department in favor of Ocheltree, though Culpepper filed successive appeals and exhausted every remedy before the Department, until patent issued to his adversary in February, 1915 (R., p. 4). He also maintained residence upon the land with his family, cultivated it, and made improvements for a period of more than five years, or until ejected therefrom by judicial procedure on October 14, 1915 (R., pp. 3, 4). Promptly thereafter he commenced action in the local courts of California to have a trust impressed on the land in his favor. After final decision against him by the Supreme Court of California (R., p. 14), petition for writ of certiorari was filed in and granted by this honorable court, and the record has now come up for final action (R., pp. 15-17).

ARGUMENT.

The question involved in this case, briefly, is whether or not a contestant's preference right of entry may be extended until thirty days after the land covered thereby has been restored from a first form reclamation withdrawal; and, of

course, there is necessarily involved the question whether any valid contest can be initiated against an entry covering land included within such a withdrawal.

The facts in the present case are practically "on all fours" with those in the companion case of Archie J. McLaren, administrator of the estate of John McLaren, deceased, petitioner, *vs.* L. G. Fleischer, No. 291 of this term, with the single difference that in the instant case notice of cancellation and of preference right was issued to respondent a few days prior to the Department's regulations of January 19, 1909 (*supra*), whereas in the case cited they were subsequent to the regulations. However, Ocheltree had not exercised or attempted to exercise his preference right before the new regulations were issued, and, accordingly, we submit that there is no material difference between this case and the other. Accordingly, we respectfully ask that our argument in the McLaren-Fleischer case be considered here, as we believe that these two cases will be argued and submitted together, just as they were previously submitted on petitions for writs of certiorari.

With a prayer that the decision of the Supreme Court of California be reversed, this case is

Respectfully submitted,

SAMUEL HERRICK,
HENRY M. WILLIS,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States.

October Term, 1920

ROBERT L. CULPEPPER, *Petitioner*,
v.
JAMES M. OCHELTREE. } No. 292.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

STATEMENT.

This case is here on certiorari to the Supreme Court of the State of California, and presents for decision the merits of a proceeding begun by the petitioner to have the respondent decreed to be a trustee for the former of the legal title to a tract of land which passed from the United States to the latter under a homestead patent issued by the Land Department.

The court of first instance was the Superior Court of Riverside County, California. The complaint was filed December 27, 1915 (R. 1 to 7). From an order sustaining a demurrer to the complaint an appeal was taken on August 23, 1916, to the State Supreme Court (R. 10). The latter court, on December 1, 1919, filed its opinion

in affirmance of the lower court's action (R. 13. See pages 20 to 25 of Record in No. 291). On December 29, 1919, a motion for rehearing was denied (R. 13).

Thereupon this court was petitioned for a writ of certiorari. The petition was granted, the writ issued and the return thereunder was filed here June 15, 1920.

The cause was in the said Superior Court from December 27, 1915, until August 23, 1916—September 28, 1916 (R. 7 to 11). *But it was in the said Supreme Court from September, 1916, until December 1, 1919—January 2, 1920 (R. 12 and 13).* The reason for the seeming long pendency of the case in the State Supreme Court is satisfactorily indicated by the matter at pages 12 and 13 of the Record, where appears a stipulation executed *October 6, 1916*, submitting Nos. 292 and 291 in said Supreme Court "upon the briefs now on file therein." On June 17, 1919 (R. 13), the order submitting the *two* cases was vacated "for the purpose of giving leave to file additional briefs."

The probable real cause for the long pendency of the case in the State Supreme Court was that during the period of its pendency there the case of Edwards v. Bodkin (No. 495 in this court and entitled herein as Bodkin v. Edwards) was pending in the Federal Courts in California. *Reasonably certain is it that the order of the State Supreme Court of June 17, 1919, in Nos. 291 and 292, "giving leave to file additional briefs," was obtained by counsel, for the purpose of endeavoring to impress upon the mind of the State Supreme Court and to persuade it to approve, adopt and follow, the views the Court of Appeals announced through Circuit Judge Morrow on March 8, 1918, in Edwards v. Bodkin (249 Fed. 562) and which, perforce, District Judge Trippett effectuated in his decision of April 9, 1919, in the same case*

(267 Fed. 1004). But the State Supreme Court's opinion, 185 Pac. 967, and its denial of a motion for rehearing, evince anything but favorable notice or consideration of the views of the Court of Appeals or of the action District Judge Trippett thereafter was under compulsion to take, by reason of "the law of the case" doctrine.

ARGUMENT.

I.

ALL THE LEGAL QUESTIONS IN NOS. 291 AND 292 ARE IDENTICAL WITH SOME OF THE LEGAL QUESTIONS IN NO. 495.

This court's decision of February 28, 1921, in No. 495 has not only affirmed decisions which the Department of the Interior has wisely and justly refused, and will continue to refuse, to follow, because of an unsoundness therein that is palpable, but its affirmance thereof was made under the serious and extraordinary misapprehension that the decisions were rendered in cases that went to a hearing and determination on questions of fact.

That misapprehension, unless perceived by this court, will inevitably eventuate in numerous speculative and even champertous suits, and also cause the bench below and the bar, to the extent that the latter is familiar with No. 495, to be able to say, with absolute accuracy, that a case which was heard and determined below upon very important questions of law exclusively, and which was brought here on questions of law exclusively, was, nevertheless (AND UNDER A MOTION TO DISMISS OR AFFIRM, WHICH FAILED TO SET OUT A SINGLE VALID REASON FOR GRANTING THE

SAME, AND WHICH CONTAINED NOT THE SLIGHTEST HINT OR SUGGESTION THAT THE DECISIONS BELOW TURNED ON QUESTIONS OF FACT, AND WHICH WAS IGNORED BY BODKIN'S COUNSEL BECAUSE IT WAS PLAINLY FRIVOLOUS), decided here because of the unfounded assertion here, due to misappresension, that the decisions below turned on questions of fact.

Like two peas in a pod, separate entities but of the same substance, are the complaints in Nos. 291 and 292. They were drafted by the same hand, originated in the same brain, have the same number of paragraphs, contain the same prayers, are of the same length, are subscribed by the same learned counsel, and were filed on behalf of absent plaintiffs. *They will serve admirably as forms for use in many similar suits, should this court fail to make it evident that it did not by its affirmance of February 28, 1921, in No. 495, Bodkin v. Edwards, approve and confirm "the law of the case" as expounded by the Circuit Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562.*

The complaint in this case (No. 292) was verified by counsel for Culpepper, because "the plaintiff is absent from the County of San Bernardino." The complaint in No. 291 was also verified by the same counsel on behalf of an absent client. From the complaint the following material allegations are gleaned, to wit:

A. One Danforth Arnold (who is in no wise at interest in this litigation) made a homestead entry of the land in suit on February 10, 1903 (R. 2).

B. The land so entered was withdrawn under "first form" on September 8, 1903, in aid of the purposes of the Reclamation Act of June 17, 1902, 32 Stat. 388 (R. 2).

C. January 30, 1908, Ocheltree, the respondent here, filed a contest against the Arnold entry (R. 2).

D. September 30, 1908, the General Land Office canceled the Arnold entry under the Ocheltree contest (R. 3).

E. January 13, 1909, the register and receiver of the United States Land Office at Los Angeles, California, notified Ocheltree that by reason of his successful contest he had earned a right of preference of entry of the land in suit under the second section of the act of May 14, 1880, 21 Stat. 140, which he might exercise within thirty days after abatement of the "first form withdrawal" and after the land had been restored to public entry (R. 3).

F. The land was restored to settlement April 18, 1910, and to entry May 18, 1910 (R. 3).

G. April 18, 1910, Culpepper, the petitioner here, made settlement on the land (R. 3).

H. May 18, 1910, Culpepper applied for a homestead entry of the land (R. 3).

I. May 18, 1910, Ocheltree applied for a homestead entry of the land in exercise of his said right of preference of entry (R. 3).

J. May 18, 1910, all applications were suspended pending a government inquiry as to the official survey of the land (R. 4).

K. May 22, 1912, such suspension was revoked (R. 4).

L. May 24, 1912, Ocheltree's application for entry was allowed and Culpepper's was rejected (R. 4).

M. Thereafter Culpepper "exhausted all remedies" * * * in the Land Department "to secure his said right as a settler" (R. 4).

N. February 4, 1915, a patent for the land was issued

to Ocheltree under the entry which he was allowed to make on May 24, 1912 (R. 4).

O. That the officers of the land department "acted wrongfully and contrary to law" and prejudicially to Culpepper in the premises, in that they refused to recognize the right he acquired by virtue of his settlement on the land on April 18, 1910 (R. 4).

P. That the conduct of the land department was "particularly contrary to the express terms of the act of Congress of May 14, 1880," supra, because, forsooth, the said department had held that Ocheltree, by reason of his successful contest against the Arnold entry, had earned a right to enter the land in preference over all others for a period of thirty days after May 18, 1910 (R. 5).

Q. That the several decisions of the land department in the matter "misapplied, misconstrued and misconceived the laws of the "United States" applicable to Culpepper's settlement on the land on April 18, 1910, and to Ocheltree's successful contest against the Arnold entry (R. 5).

R. That the alleged errors of the land department prevented Culpepper from obtaining title to the land and led to the unlawful passing of title thereto to Ocheltree (R. 6).

Here seems to be the appropriate place to show what the State Supreme Court perceived as the only difference worthy of notice between the facts of this case, No. 292, and the facts in No. 291. Said court made this observation:

> "The only difference between the two cases is that the defendant herein (Ocheltree, in No. 292) received notice on January 13, 1909, that he had been successful in his contest and was awarded a preference right to enter the land within thirty days after it should be restored to entry. The defendant in

McLaren v. Fleischer (No. 291) received a similar notice on February 11, 1909—the former notice coming within the time section 7 of the rules and regulations of the Land Department of June 5, 1905, were in force and the latter after section 7 had been superseded by section 6 of the Rules and regulations of January 19, 1909.

"In view of what we have said in McLaren v. Fleischer this difference in the time of receipt of notice is immaterial and therefore upon the authority of that case the demurrer herein is sustained.

"Judgment affirmed." (R. 14 in No. 292, 185 Pac. 971.)

The ultimate question in Nos. 291 and 292 was stated by the State Supreme Court (R. 23 and 24 in No. 291) to be this:

> "The sole question, therefore, which is presented for determination here is whether the officers of the land department made a mistake of law in granting the defendant a preference right, in the recognition of which it became necessary to cancel plaintiff's entry" (i. e., to reject plaintiff's application to enter, for plaintiff had never been allowed an entry).

Of course the State Supreme Court felt constrained to notice in its opinion the previous rulings of the Circuit Court of Appeals, speaking through Circuit Judge Morrow, in Edwards v. Bodkin, 249 Fed. 562. In its notice and discussion of those rulings (R. 25 in No. 291) it said this:

> "Appellant relies upon Edwards v. Bodkin, 249 Fed. 562, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the

> preference right. *It was there held that the Commissioner of the General Land Office had* MISTAKEN THE LAW *in declaring* that the settler had abandoned his homestead claim." (Capitals and italics supplied.)

When it is clearly in one's mind that the State Supreme Court's opinion, 185 Pac. 967, was filed December 1, 1919, and that said date was about eight months subsequent to District Judge Trippett's decision of April 9, 1919, and about five months subsequent to the said District Judge's decision of July 24, 1919, on rehearing, in Edwards v. Bodkin, 267 Fed. 1004, *it will be as obvious as the existence of Deity that the State Supreme Court never intended that its opinion should be understood as containing a statement to the effect that the Federal Courts, in Edwards v. Bodkin, had actually reviewed the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department and had found that such testimony was without any, or legally sufficient, evidence to sustain the findings of fact the Land Department had made in that proceeding and, therefore, that said Department had "mistaken the law."*

Nor will one who reads intelligently the opinion of the State court conclude therefrom that said court believed, as this court in its decision of February 28, 1921, in No. 495, said it believed, that the Federal Courts had decided Edwards v. Bodkin because those courts had found that the Land Department had not considered matters presented to it by Edwards, which it should have considered. In short, the State court apprehended what was the actuality, viz, that the Federal courts in effect had conceded that THE LAND DEPARTMENT HAD NOT MISTAKEN OR MISSTATED THE FACTS, BUT HAD "OVERLOOKED" OR "MISUNDERSTOOD" THE EFFECT THEREOF IN LAW.

The State tribunal's utterance reflected a truly scientific appreciation of the rationale of the views of the Federal courts. *It actually knew that what the Federal Courts had said was this, that the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, relieved homestead entries from contest upon charges of abandonment and that the Land Department had "misunderstood" or "overlooked" that legislation* AND, THEREFORE, HAD MISTAKEN THE LAW WHEN IT PERMITTED BODKIN TO INITIATE AND MAINTAIN HIS CONTEST AGAINST EDWARD'S ENTRY.

Courtesy possibly inspired the State Supreme Court to desist from express dissent by it from those other rulings of the Federal courts in Edwards v. Bodkin which, if the State court had deemed them sound and followed them, would inevitably have caused the State court to hold and decide entirely to the contrary of what it did hold and decide. For instance, in 249 Fed. 562, 567, it was expressly ruled that the Interior Department's regulations of June 6, 1905, 33 L. D., 607, were invalid to the extent that they provided for the exercise of a contestant's preference right at any time within thirty days after restoration of land to entry. Those regulations, as the Federal Court said, were tantamount to an attempt "to amend, modify or change the act of May 14, 1880."

The same regulations were before the State Court and were discussed by it in Nos. 291 and 292 (after they had thus been condemned by the Federal Court) but the State Court held that they were lawful and reasonable. If the contrary of that had been the State Court's holding then, of course, said court and the Federal Court would have been in agreement, and there could not have appeared in the petition for certiorari which was filed in this court in Nos. 291 and 292 this observation, to wit:

> "that the opinion of the highest court of the State of California in this cause, holding that the respondent could and did secure a preference right to the land in controversy, under the act of May 14, 1880, 21 Stat. 141, which right took effect after said land had been restored from the reclamation withdrawal, is in direct conflict with the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Edwards v. Bodkin, 249 Fed. 562, 568" (pp. 2 and 4 of the petition for certiorari in No. 291).

Nor did the State Court find it possible to abide the conclusion of the Federal Court, 249 Fed. 562, 569, to the effect "that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909," 37 L. D., 365. *It is very likely that the State Court instantly perceived the force of the proposition that if any statute right whatsoever had been acquired, it was utterly incompetent for the Land Department, by a regulation, to destroy or nullify it.*

From the foregoing it must be apparent that the only legal questions in No. 495 which are not also present in Nos. 291 and 292 are these, to wit:

A. Was the Federal Court accurately stating the law when it said, 249 Fed. 562, 566, that an affidavit of contest which is in fact executed on information and belief, but which appears to have been executed on personal and actual knowledge, "insufficient to initiate a contest," notwithstanding corroboration thereof by a person deposing on personal and actual knowledge. (See pages 34 and 35 of Record in No. 495 for a copy of the affidavit of contest Bodkin filed against Edward's entry.)

B. Was the Federal Court faithfully interpreting the law when it said, 249 Fed. 562, 567, that the 5th section of the act of June 27, 1906, supra, relieved homestead entries from contest and cancellation for abandonment?

II.

LAWLESSNESS RESULTS IN THE CONVICTION OF EDWARDS, APPELLEE IN NO. 495, AND OF CULPEPPER, PETITIONER IN NO. 292, FOR CRIMINAL CONSPIRACY TO INTIMIDATE BODKIN, APPELLANT IN NO. 495. SEE 223 FED. 309.

The complaints in Nos. 291 and 292 represent that the plaintiffs in those cases resisted the rulings on their claims which were made by the Land Department, even to the extent of remaining in possession of the lands claimed by them, respectively, until removed through legal processes obtained in possessory actions instituted by the defendants (R. 13, in No. 291 and R. 3, in No. 292). But it is not stated in the complaint in No. 292 that the plaintiff in that case was indicted, tried and convicted for conspiracy with Edwards, the plaintiff below in No. 495, to intimidate Bodkin, the defendant below in No. 495, in the enjoyment of a right secured under the laws of the United States. However, it is admitted in Edwards' complaint in No. 495, in language abusive of all officers of the law who afforded the protection of the law to Bodkin, that he, Edwards, was convicted of and imprisoned for said offense (R. 8 in No. 495).

The said two defendants in the said criminal action obtained a review by the Circuit Court of Appeals of the judgment of conviction. They were represented in the criminal action by the same attorneys who appear for them in the civil actions they instituted, respectively, and which civil actions (Nos. 292 and 495) have come before this court. The essence of their defense in the criminal action, as is inferrable from the decision of the said Court of Appeals affirming the conviction, 223 Fed. 309,

was that Bodkin had not acquired a preference right of entry by reason of his successful contest against Edwards' entry; that Bodkin had not become entitled to an entry of the land, and that the only one entitled to entry of the land and to possession thereof was Edwards.

The said criminal action was reviewed in said Court of Appeals upon an exception to an instruction given by the trial court, "as well as the refusal of the court to give an instruction embodying the opposite view of the law," 223 Fed. 309, 311. The instruction given was that "Bodkin, by virtue of the allowance of June 1, 1912," * * * "of his application previously filed" * * * "to enter as a homestead," * * * "acquired the right" * * * "to make settlement and residence upon said land." In the argument on behalf of the convicted conspirators it was contended, in substance, that the allowance of an entry in the exercise of a successful contestants' preference right *"long after the 30-day notice required by law,* but after the restoration of said lands to entry" did not "confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States."

After stating that the record before it did not disclose the date of cancellation of Edward's entry, nor the date of the notice to Bodkin of his accrued right of a preference of entry, the Court of Appeals, "finding no prejudicial error in the record," affirmed the judgment of conviction. *The record in No. 495 in this court shows that Edward's entry was canceled April 19, 1910, which was after abatement of the first form withdrawal and after execution of the order of restoration of the land to the public domain, and that the notice to Bodkin of his preference right was given subsequent to that date* (R. 49 in *No. 495*). *Therefore Bodkin's preference right application, which was filed May 18, 1910, was actually filed*

within the thirty days allowed by law for its filing. (R. 55 in No. 495.)

Is it not a moral certainty that those facts were well known to the conspirators and to their counsel at all times during and after the trial of the criminal action? If so known, was the Court of Appeals aided or its labors increased, by an argument from counsel which contained the assertion that:

> *"The question raised,* briefly stated, is: Is the action of local land officials in permitting and receiving the filing of a homestead application, based solely upon a preference right of entry, theretofore awarded to the applicant by the Land Department at the successful termination of a contest of an entry upon lands, *while withdrawn from all form of public entry under the Reclamation Act,* and the allowance by the local land officials of such homestead entry upon such preference right, *long after the 30-day notice required by law,* but after the restoration of said lands to entry, within the jurisdiction of the land officials, and does such action confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States?" (Italics supplied.)

III.

NO. 495 WAS, BEYOND POSSIBILITY OF ANY REASONABLE DOUBT, IN THIS COURT NOT OTHERWISE THAN ON AN APPEAL FROM RULINGS AS TO THE EFFECT IN LAW OF FACTS AS AGREED TO, AND OF UNCONTROVERTED TESTIMONY. IT WAS HERE VIRTUALLY AS NOS. 291 AND 292 ARE HERE, *i. e.*, ON ADMITTED FACTS AND FOR RULINGS AS TO THEIR EFFECT IN LAW.

In adjudicating the Bodkin-Edwards case, this court erroneously supposed that it had been adjudicated in the courts below upon a finding by the courts below that the Land Department had not considered matters presented to it by Edwards, which it should have considered. But there not having been any such adjudication below in said case, *and the record in said case showing clearly that the Land Department had heard and re-heard everything Edwards had ever presented to it*, we respectfully submit here for the consideration of this court the proposition, that its affirmance of February 28, 1921, in No. 495 cannot from any truly scientific and logical viewpoint, although it might upon the basis of technicalities and fictions unknown to us but which jurisprudence possibly recognizes and enforces, be regarded and treated by bench and bar otherwise than as an unqualified approval and unreserved confirmation by this court of the views of the courts below on the matters of law which those courts held were *controlling* in No. 495.

In other words, as the courts below very clearly and painstakingly indicated that their decisions against Bodkin were based solely upon their rulings that he had never initiated a contest in the Land Department, because (1st) his affidavit of contest, although not so appearing, was executed on information and belief, and (2nd) that, even if it had been executed on personal knowledge, the affidavit of contest could not be allowed because, forsooth, the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, forbade a contest—we submit that it is logically impossible for this court's decision of February 28, 1921, to have been an affirmance, without also and necessarily having been the effective means whereby Bodkin has been deprived of his property and Edwards invested with the title thereto owing to nothing else but the views of the

courts below on questions of law exclusively. *It is inescapable, we think, that this court has fully concurred in and completely committed itself to such views on matters of law.* BUT THE SUPREME COURT OF THE UNITED STATES WOULD NOT THUS HAVE COMMITTED ITSELF TO DEMONSTRABLE FALLACIES IN LEGAL REASONING IF IT HAD NOT MISCONCEIVED THE CHARACTER OF NO. 495.

IN OUR DEMONSTRATION OF THE FALLACIES WHICH THE SUPREME COURT OF THE UNITED STATES HAS, INADVERTENTLY, CAUSED TO BE TREATED AS VERITIES, WE WILL HERE REVIEW THE HISTORY OF BODKIN V. EDWARDS. District Judge Bledsoe's decision in 241 Fed. 931 discusses Edwards' complaint (the one in No. 495) with thoroughness. Said decision held that the malicious onslaughts by the maligning Edwards upon Department of the Interior officials and upon Department of Justice officials (vide paragraphs 2, 5, 12, 14, 15, 17, 20, 22, 23, 26, 32, 33 and 34 of the complaint at pages 2 to 10 of the R. in No. 495) were "most general and inconclusive assertions with respect to fraud" and afforded no basis for judicial inquiry as to whether "any fraud was actually committed or that any mistake of law in the overruling of the plaintiff's protest was indulged in" by the Land Department, or as to whether any mistake or misstatement of fact was made by said department in its findings in the contest proceeding. *Judge Bledsoe understood that the sole alleged ground for revision and change by the judiciary of the Land Department's findings in the contest proceeding was fraud on the part of officers of that Department in making the findings, and that no alle-*

gation in the bill of complaint (in No. 495) *was of a character warranting judicial inquiry as to those findings with view to determining whether they should be revised.*

As to the issue of law in the case the said Judge remarked:

> "The main question in the case centers around the right of the Department of the Interior to allow the preferential right inuring to the successful contestant of an entry upon public lands to attach and be taken advantage of after the lands have been restored to entry subsequent to a 'first form' withdrawal under the act of June 17, 1902, 22 Stat. 388." 241 Fed. 931, 933.

Judge Bledsoe's views on that issue of law were expressed thus:

> "In my judgment, the action of the Department in holding that the right accrued as of the date of restoration of the land to the public domain was a correct application of the law in the premises." 241 Fed. 931, 934.

The report of Judge Bledsoe's opinion in the Federal Reporter does not show that he expressly stated therein that Edwards might amend his complaint. Ordinarily an amendment would be permitted. By electing to appeal (if there was election owing to no express or implied refusal to allow an amendment of the complaint), Edwards chose to stand on his pleading. *Whether that pleading duly presented any question of fact whatsoever which the judiciary could properly regard as entitling Edwards to a decree was clearly decided in the negative by Judge Bledsoe.*

The last two paragraphs of the opinion of the Court of Appeals on the appeal to it *from Judge Bledsoe's rul-*

ing, which opinion was delivered by Circuit Court Judge Morrow, 249 Fed. 562, 570, 571, are these:

> "The motion to dismiss was made on the ground that the complaint does not state facts sufficient to constitute a cause of action. We think the complaint is not so defective as to justify its dismissal. It does state facts sufficient to constitute a cause of action, but the facts are imperfectly stated, and with respect to the proceedings in regard to the defendant's lieu land selection are not fully stated.
>
> "The judgment is reversed, with direction to deny the motion to dismiss, and with leave to plaintiff to amend his complaint, if so advised."

WHEN THE CASE CAME AGAIN BEFORE THE DISTRICT COURT, DISTRICT JUDGE TRIPPET VERY WISELY REMARKED THAT "UNDER THE DECISION OF THE CIRCUIT COURT OF APPEALS (249 FED. 562) HE (BODKIN) HAD NO RIGHTS TO BE CONSIDERED." 267 FED. 1004, 1009.

It is of first importance that we inquire diligently here as to what it was that influenced Judge Trippet to say that the decision in 249 Fed. 562 was an adjudication that Bodkin "had no rights to be considered." In such inquiry the first matter for ascertainment is the true character of the grounds upon which Edwards rested his bill of complaint, for it was with respect to those grounds, and with respect to them alone, that the Court of Appeals decision on the appeal from the order dismissing the complaint so expounded the law as to leave Bodkin without any rights to be considered.

Edwards' complaint was grounded entirely upon the proposition that the homestead entry he made on December 1, 1902, was not lawfully canceled on Bodkin's con-

test because, forsooth, *the Land Department was without authority of law to permit a contest proceeding against it.* (Pars. XI and XX of complaint, at pages 4 and 6 of the R. in No. 495, respectively). His complaint rests his case upon whatever rights continued in him under his entry, despite the cancellation thereof by the Land Department. This is evident from these allegations of Edwards' complaint (references being to the record in No. 495), to wit:

A. That he made homestead entry December 1, 1902 (R. 1).

B. That he made a final proof under the entry on April 23, 1909, which he alleges the Land Department refused to consider. (Such alleged proof was made after hearing in the contest, and after decision therein by the Register and Receiver. R. 37. The department fully considered the proof, R. 50 to 52.)

C. That the Land Department promulgated regulations in 1905 governing the contesting of homestead entries of land within reclamation withdrawals, which were violative of law (R. 4).

D. That Bodkin's affidavit of contest was executed on information and belief (R. 5).

E. That Edwards was upon the land when served with notice of Bodkin's contest (R. 5).

F. That *"at the hearing of said contest if was found, conceded and established* WITHOUT DISPUTE that plaintiff had established residence, had made improvements," et cet. (This allegation is obviously false in the light of the decisions of the Land Department in the contest. R. 37 to 43.)

G. That before actual cancellation of his entry on the Bodkin contest, the Interior Department, in 1909, promulgated a regulation which provided "that in all cases where

contest had been allowed, if preference right had not been used thereunder, such regulation would ipso facto terminate all right futurely promised by the prior (1905) regulations" (R. 5 and 6).

H. That on June 1, 1912, the Land Department allowed a homestead entry to Bodkin "solely because of the bias and prejudice aforesaid" (R. 6).

I. That the department denied him due process in his contest against Bodkin's preference right homestead entry (R. 9). The fact is that the department duly heard the said contest (R. 53).

J. That Edwards protest against Bodkin's "scrip" locations was arbitrarily denied. (R. 9. The fact is that the department duly heard the protest. R. 59 to 64.)

Some of the matter which Edwards thrust upon Judge Trippet's notice in an attempt to prove such of the foregoing allegations as are not statements of conclusions of law, was deliberately omitted from the record in this court in No. 495, with the passive or tacit, if not active or express, approbation of counsel for Edwards who, by not specifying it in his praecipe for the record, seemed to us, at least, to have *agreed with us that it was utterly without materiality under any allegation of fact in his client's complaint as well as utterly detached from and foreign to the basis, or any part of the basis, for the conclusions reached by Judge Trippet and the rulings thereafter made by the Court of Appeals, when it spoke through District Judge Wolverton.*

The matter or "evidence" omitted from the record in No. 495 in this Court was the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department, the colloquy between counsel and Judge Trippet before such testimony was put in, copies of the pleadings and notes of the proceedings in the State

Court in the possessory actions and the copies of the three patents that issued to Bodkin. (The propriety of a reference by us here to what was omitted from a record in another case in this court could be questioned, if the other case were not one which, as we sincerely believe, this court might desire that we discuss here in view of our petition for rehearing therein. We have filed in the office of the Clerk of this court a certificate by the Clerk of the Court of Appeals as to every word and figure omitted from the record in this Court in No. 495.)

We do not intend to discuss the obvious in this court. Therefore we shall not dilate on the uselessness, in a judicial sense, of the presence in a record of a case of the nature of No. 495, of the copies of the patents to Bodkin and of the matter relative to the possessory actions. *But we must, because it is not less our duty to this court than to our clients in Nos. 291 and 292, make it indisputably clear that there were valid reasons for omitting from the record in No. 495 the testimony which was taken in the contest between Bodkin and Edwards in the Land Department.*

Why the testimony taken in the contest proceeding between Bodkin and Edwards in the Land Department was omitted from the record in No. 495 will become apparent upon reflection on these facts:

A. Nowhere in the bill of complaint in No. 495 will there be found a single allegation that the Land Department's findings of fact were without any evidence whatever to support them.

B. Nowhere in said bill of complaint will there be found a single allegation that Bodkin, or anyone else, committed a *specified* act in fraud upon the Land Department that resulted in the obtaining from it of the findings of fact it made.

C. Nowhere in said bill of complaint will there be found a single allegation of a fact which, if true, would show that Edwards was denied a day in court in the contest proceeding, or was denied due process in any particular.

D. Nowhere in said bill of complaint will there be found a single allegation that the facts as found by the Land Department and accepted as the facts in the case, are wholly insufficient in law to sustain a ruling thereon that there had not been the residence upon the land and the cultivation thereof by Edwards *that the statutes required in 1907 to 1911 in the maintenance of the ordinary homestead entry.*

The only possible basis which the courts below could find, or this court can find, for reviewing the Land Department's findings of fact are the allegations in Edwards' complaint that the many Land Department decisions against him and other fancied wrongs were due to Bodkin's "friendly relations with certain Land Department officials (R. 5), to "the assurances given the defendant and in aid of his speculative program, department officials decided that abandonment was proved" (R. 5), to "field agents of the department" * * * "making wrong reports concerning plaintiff and showing partisan zeal in many ways" (R. 5), to "a conspiracy" between Land Department officials, Department of Justice officials and others (R. 7), to oppression and coercion from a United States Attorney (R. 7), to intimidation of a local court by a United States Attorney (R. 8), to "manufactured evidence" (R. 8), to "discrimination against him in proceedings before the Land Department" (R. 9), to "bias and prejudice culminating in a conspiracy" (R. 10), to "the most extreme prejudice and partisan intent" (R. 10), and to "the voluntary and involuntary fraud to which plaintiff has been subjected" (R. 10).

Those serious charges were made against the very officers of the Land Department who, throughout several years, patiently heard, painstakingly considered and calmly and impartially determined the many and varied attacks which Edwards had made, in actual abuse of the processes of the Land Department, against Bodkin. *But not the slightest attempt was made to substantiate those serious charges. Judge Trippet, doubtless deeming it but an act of simple justice to the said officials of the government, made this observation:*

> "The plaintiff offered no proof regarding the misconduct of any of the officers of the Land Department" (R. 74).

As there was no proof offered of wrong doing by the government in the matter, of course there was no judicial review and revision of the Land Department's findings on the ground of irregularity. *Why, we ask, in view of the foregoing circumstances, should a man who is sued by an alleged pauper have paid for the printing in this court of about 160 pages of matter which, as is obvious, had not the slightest effect on the deliberations of the courts below?*

If all the testimony given from the witness chair in the District Court in No. 495 (R. 65 to 71 in No. 495) were accepted at its face value (there being absolutely nothing therein to show fraud practiced upon the Land Department or arbitrariness practiced by it), it would be impossible to say with respect to it that it warranted the judiciary in revising, modifying or changing the Land Department's findings of fact. *Is it supposable that any court would disregard or ignore, or impute error to, the Land Department's findings of fact in a case which involved the patenting of a tract of land to one of two rival*

claimants, upon only such wholly uncorroborated and duly objected to testimony, having pertinence exclusively under the issues of fact which were duly heard and determined in the Land Department as was given from the witness chair in the District Court in No. 495 by the man who was adversely affected by those findings, who had maliciously questioned the integrity of sundry Government officials, who had been convicted of criminal conspiracy and who, himself, together with others, without let or hindrance, testified in the proceeding in the Land Department that eventuated in the findings?

What then is apparent on the face of the decisions below as to what was held concerning the Land Department's findings of fact? *On the face of those decisions, in the express language thereof, it was held that the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, relieved reclamation act homestead entries from contest on a charge of abandonment. From that holding it logically followed that it was a matter of no concern to the courts below whether the Land Department had or had not made findings of fact in a Bodkin-Edwards contest proceeding, and therefore, and because Edwards' bill of complaint had not so impeached the findings as to warrant a judicial inquiry as to them, there was no review of said findings by any court below and no implication in the decision by either that there was such review.*

When the Supreme Court of the United States affirms, it concurs in a conclusion reached and a judgment given by the lower court. The affirmance presupposes knowledge of the basis for the conclusion or judgment announced below. The affirmance approves and confirms such basis. If the basis be in fact exclusively, the court accepts the fact as found below. If the basis be in law

exclusively, the court sanctions and approves the rulings in law as made below.

AN APPELLATE COURT, BY AN AFFIRMANCE, CANNOT CHANGE THE CHARACTER OF THE CASE BELOW FROM ONE WHICH WAS DECIDED BELOW ON QUESTIONS OF LAW TO ONE WHICH WAS DECIDED BELOW ON QUESTIONS OF FACT. STATED WITH APPOSITENESS AS TO NO. 495, OUR PROPOSITION IS THIS: THAT IF THE DECISION OF DISTRICT JUDGE TRIPPET, 267 FED. 1004, AND THE DECISION OF THE COURT OF APPEALS, SPEAKING THROUGH DISTRICT JUDGE WOLVERTON, 265 FED. 621, IN THEIR EXPRESS AND UNMISTAKABLE TERMS, ARE CONCURRING DECISIONS UPON QUESTIONS OF LAW WHICH ARE DETERMINATIVE OF THE MERITS OF THE CASE OF EDWARDS V. BODKIN, IT UNAVOIDABLY FOLLOWS FROM THE AFFIRMANCE OF THOSE DECISIONS BY THIS COURT THAT IT HAS CONCURRED IN AND CONFIRMED THE RULINGS MADE IN THOSE DECISIONS ON QUESTIONS OF LAW, REGARDLESS OF THE STATEMENT IN THIS COURT'S AFFIRMANCE THAT THE DECISIONS BELOW WERE CONCURRING DECISIONS ON QUESTIONS OF FACT WHICH WERE DETERMINATIVE OF THE CASE OF EDWARDS V. BODKIN.

The social law of simple courtesy would require the judiciary, when revising, altering, changing or disregarding the findings of fact made by one of the more important branches of the executive department of our government, to state explicitly the considerations that moved it to conclude that such findings were without due, or any foundation, in the law. If Judge Trippet revised any of

the findings of fact made by the Land Department, he gave not the slightest hint that he had revised the following finding which was made by the First Assistant Secretary of the Interior, to wit:

> "He (Edwards) evidently did considerable work on the land, in cultivating, digging brush, et cet.; *but this work was after he had personal knowledge that the contest had been filed*" (R. 43).

It is not believable that any enlightened court, without stating fully and clearly its reasons for so doing, would have rejected as being without due or any evidence to support it the following findings of fact made by the General Land Office in the contest proceeding between Bodkin and Edwards, to wit:

> "Defendant had knowledge of the pending contest against his entry, prior to the time he returned to the claim, as plaintiff had mailed him a letter on March 26, 1908, informing him of the contest, and requesting him to sign and return a relinquishment inclosed with the letter. In answer to this letter, defendant went to the office of plaintiff and talked the matter over with him.
>
> "The testimony of the witnesses, including that of the defendant, conclusively established the truth of the charges made in the affidavit of contest.
>
> "The testimony shows beyond a question that, at the time the contest was begun, no improvements of any kind were then on the premises, that defendant had been absent for a long period, and that he had never cultivated any part of the land.
>
> * * * * * *
>
> "Defendant's excuse for being away from the land is that he could not make a living on the same, owing to lack of water for irrigation purposes. He offered testimony to this effect, though it is shown that

others in the same community managed to get along under similar conditions and circumstances.

"Defendant returned to his claim about the first of April, 1908, and after failing to get the contest dismissed, commenced the first active work of improving the land, other than that heretofore referred to.

* * * * * *

"Defendant admits that in 1907, prior to his return to the land, he registered and voted at the town of Imperial, and he would not say that he did not vote at other times prior thereto.

* * * * * *

"He admits that he saw the Government circular relative to these Government projects, and if he did, he must have been then and there advised that he must meet all the requirements of the homestead law, and that he could not depend upon water being brought to the land by the Government and use that as an excuse for failure to meet the requirements.

"In the instructions of the Department as to the arid lands, it was distinctly stated that no modification of the homestead law in its application to said lands could be made, as the Secretary of the Interior had no authority to extend the time for the establishment of residence, or to change any of the conditions of the homestead law as to the maintenance of such residence and cultivation of the land. See 32 L. D., 633" (R. 40 and 41).

In his second opinion (R. 78 to 83), the one on rehearing, Judge Trippet held, as he was perforce required to hold, that, in contemplation of law, Bodkin had never initiated a contest. That holding, as he was careful to make plain, was rested upon the Court of Appeals ruling in 249 Fed. 562. *The fact in proof which Judge Trippet, and afterwards the Court of Appeals, deemed sufficient to sustain such holding, to wit, the fact that Bodkin executed his affidavit of contest on information*

and belief, although it appeared to have been executed on actual knowledge and was corroborated on personal knowledge, is set out at pages 64 and 65 of the record in No. 495 in this court. THE SECOND OF THE ERRORS SPECIFIED IN THE ASSIGNMENT ON THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES IN NO. 495 CHALLENGED THAT HOLDING.

That the said fact and the said ruling thereon were deemed by Judge Trippet to be of vital import, is deducible from this observation by him, viz, "If there was no contest, the defendant never acquired any preference right, and that fact has an important bearing throughout this case" (R. 80).

Immediately after making the foregoing observation, Judge Trippet said, that "the court of appeals points out (p. 569) that EVEN THOUGH THERE WAS A CONTEST, THE DEFENDANT BODKIN COULD NOT HAVE OBTAINED ANY PREFERENCE RIGHT" (R. 80).

The Court of Appeals did so point out, for it said in 249 Fed. 562, 569, that:

> "We are of opinion that whatever preferential right the defendant had secured by his contest was terminated by the regulations of January 19, 1909" (37 L. D., 365).

THE THIRD OF THE ERRORS SPECIFIED IN THE ASSIGNMENT ON THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES IN NO. 495 CHALLENGED THAT HOLDING.

As it had been held by the Court of Appeals theretofore (249 Fed. 562), (1st) that there had been no contest, and (2d) that even if there had been one the regulations of 1909 terminated the preference right, was not

Judge Trippet compelled by "the law of the case" doctrine to remark, *in the light of the record as printed in this court,* that Bodkin "had no rights to be considered" (R. 80).

The only other matter of fact or of law noticed by Judge Trippet was the construction placed by the Court of Appeals on the 5th section of the act of June 27, 1906, in 249 Fed. 562, 567. In noticing it, Judge Trippet, who might or might not have actually agreed with it, availed of the occasion to say: "In any event the Court of Appeals has settled the law of this case, and this court must follow the decisions upon that subject" (R. 81). Then proceeding to show the extent to which that construction of a statute was controlling in the case, Judge Trippet said:

> "It must be borne in mind that the Court of Appeals in this case has decided, that the plaintiff did not have to make improvements upon the land. If the Land Office meant by stating that the plaintiff did not act in good faith, in that, he did not make improvements and reclaim the land as required by law, then the opinion of the Court of Appeals is to the effect that he did not have to comply with the homestead law in this regard during the times of withdrawal" (R. 82).

THE FIRST AND SECOND OF THE ERRORS SPECIFIED IN THE ASSIGNMENT IN NO. 495 IN THIS COURT BROUGHT THAT CONSRUCTION OF A STATUTE OF CONGRESS UNDER REVIEW HERE.

The Court of Appeals opinion, delivered by District Judge Wolverton (R. 84 to 86), on the appeal from Judge Trippet's rulings, contains this all too true observation:

> "There is much testimony in the record that is concededly irrelevant and immaterial, much that is incompetent as well, but its admission by the trial court over objections and exceptions affords no ground in a cause in equity for reversal. The Court of Appeals gives consideration only to such as is competent and material to the issues joined" (R. 86).

Nowhere in Judge Wolverton's opinion is there the shadowiest of intimations that Judge Trippet had revised, modified or changed any findings made by the Land Department. Nor is there therein anything to indicate that Judge Wolverton gave any heed to the evidence in the contest proceeding in the Land Department, which was thrust into the record on the initiative of the alleged pauper, Edwards. *Said opinion by Judge Wolverton is, by logical and necessary inference, an unmistakable announcement that the case came before the Court of Appeals the second time upon a record containing enough of fact, even in the absence of copies of the patents that issued to Bodkin, and even in the absence of the evidence taken in the contest proceeding in the land department, to sustain every one of the previous rulings of the Court of Appeals in matters of law.*

One comment made by Judge Wolverton is deserving of special notice. He says (R. 85) that the Court of Appeals first decision held that the Land Department erred in cancelling Edwards' entry for abandonment "while in fact he was residing upon the land and holding it." *Under no possibly rational view of the case can that comment be accepted as indicating that Judge Wolverton had examined the evidence adduced in the contest proceeding in the Land Department, and had held that it was without any proof whatever to sustain the said depart-*

ment's findings and conclusions that "there has been an utter lack of good faith shown in his (Edwards') relations towards his entry" (R. 38), *"that defendant (Edwards) has never established a bona fide residence on the land covered by his entry" * * * "and defendant (Edwards) admits that his home and residence has at all times been at that point (in the town of Imperial, California), that he has been engaged in business there, from a date soon after making his entry up to the time that he had knowledge of the pending contest against his entry, and then came to the land"* (R. 41), *that "Indeed, his actual home was in another county, where he was qualified as a voter by swearing that he resided there. He states that he visited the land about every six months, staying only a few days at a time. He had no house to live in. In fact he had no house completed at date of hearing, more than six years after entry."* (R. 42 and 43).

THERE WAS INDEED CONCURRENCE BELOW, BUT IT WAS A CONCURRENCE THAT SAID DEPARTMENT'S FINDINGS COULD BE, AND WERE, DULY ACCEPTED AS FINDINGS MADE IN A CONTEST PROCEEDING, BUT IN A CONTEST PROCEEDING WHICH, AS THE COURTS BELOW HELD, WAS INVALID BECAUSE FORBIDDEN BY LAW.

THE CONCURRENCE BELOW WAS UPON THE SIGNIFICANCE AND EFFECT IN LAW OF THE DOCUMENTARY EVIDENCE, WHICH WAS PRESENTED UNDER AN AGREED STATEMENT OF FACTS (R. 20 *et seq.*), AND THE TESTIMONY OF EDWARDS AND McFEE FROM THE WITNESS STAND, WHICH BODKIN, WISELY, MADE NO ATTEMPT TO CONTRADICT. OF COURSE

THIS COURT IS WITHOUT MIRACULOUS POWERS. HENCE THE EXACT CHARACTER OF THE CONCURRENCE BELOW CANNOT BE ALTERED MERELY BECAUSE THIS COURT, MISTAKING THE CHARACTER OF THE CASE BELOW, BASED ITS AFFIRMANCE UPON THE MISCONCEPTION THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT."

As did Judge Trippet, in the District Court, Judge Wolverton in the Court of Appeals appears to have taken some pains to render it clear that it could not be fairly inferred that his individual views on the pertinent matters of law were necessarily the same as those expressed by the Court of Appeals, speaking through Circuit Judge Morrow, in 249 Fed. 562. For instance, Judge Wolverton said:

> "It is unnecessary to restate the reasoning of the court which induced the result." * * * "Those reasons are fully stated in the opinion of the court." * * * "It is a rule of law no longer to be controverted in the Federal Courts, THAT WHATEVER HAS BEEN DECIDED UPON ONE APPEAL CANNOT BE RE-EXAMINED IN A SUBSEQUENT APPEAL OF THE SAME SUIT OR ACTION" (R. 85, 265 Fed. 621. Upper case supplied).

No question of fact having been decided on the first appeal to the Court of Appeals, and there having been thereafter a virtual submission of the case in the District Court on documentary evidence and testimony which Bodkin never controverted, but only contended was not sufficient in law to warrant the relief prayed for by Ed-

wards, why is it not perfectly plain that what Bodkin was seeking to have the Court of Appeals do on the second appeal, WAS NOT TO REVIEW MATTERS OF FACT BUT TO REVIEW AND REFUSE TO FOLLOW FORMER RULINGS IN MATTERS OF LAW.

BODKIN'S THEN COUNSEL MUST HAVE REALIZED, WHEN THEIR CLIENT WAS IN THE DISTRICT COURT FOR THE SECOND TIME, AND AFTER EDWARDS' AMENDED ANSWER WAS FILED, THAT THEY WERE ASSUREDLY ON THE FIRST LEG OF A JOURNEY TO THE SUPREME COURT OF THE UNITED STATES FOR RELIEF FROM RULINGS IN MATTERS OF LAW, WHICH RULINGS CAUSED JUDGE TRIPPET TO REMARK, THAT "WE WILL, THEREFORE, PROCEED TO CONSIDER THE CASE WITHOUT REGARD TO THE RIGHTS OF BODKIN, FOR UNDER THE DECISION OF THE COURT OF APPEALS, HE HAD NO RIGHTS TO BE CONSIDERED."

May we not, in view of the foregoing demonstration of the soundness of our contention, very respectfully but earnestly insist that No. 495 never was in this court, nor in any court, a case of a character that "turns essentially on questions of fact," but that it was at all times a case that presented nothing beyond or different from questions of pure law, and, therefore, that it was in this court, substantially as Nos. 291 and 292 are here, upon proceedings practically the same in effect as the submission of a case on demurrer to the evidence?

IV.

GRIEVOUSLY WRONGED WOULD BE THE RESPONDENTS IN NOS. 291 AND 292 IF THIS COURT'S DECISION OF FEBRUARY 28, 1921, IN NO. 495 SHOULD BE HELD TO BE DETERMINATIVE OF THE ISSUES IN THEIR CASES.

If it be perfectly obvious from the language of a Federal, or any, court's decision, or if it be a truth apparent upon actual study of the language of such decision in the light of the record in the case, that the decision determined absolutely nothing in the case but questions of law, is it within the range of judicial possibility that this court (misconceiving what occurred in the court below), by mere assertion that the decision, determination and adjudication below turned upon questions of fact, can require the bench and bar to disregard the real character of the basis for the decision below and treat it as a decision which was rested upon an entirely different basis than that which the court below had assigned for it? This question is not asked in a spirit of disrespect. It is propounded in aid of elucidation of our contention that this court very evidently misconceived the true character of No. 495 when it referred to it as a case which "as presented here turns essentially on questions of fact."

In No. 495 Edwards did not rely upon a settlement existent upon April 18, 1910, nor upon an application to enter which was filed May 18, 1910. *But the two petitioners in Nos. 291 and 292 do rely exclusively upon settlements made on April 18, 1910, and upon applications filed on May 18, 1910.*

Neither of the petitioners in Nos. 291 and 292 is

claiming, as Edwards claimed in No. 495, under a homestead entry which he alleges was unlawfully canceled on contest proceedings. The men who claimed under the canceled homestead entries referred to in Nos. 291 and 292, never asserted a claim after the cancellations were ordered and entered. *But as their entries were in fact cancelled under circumstances similar to those under which the Edwards entry was canceled, then their entries are still intact and existent on the records of the land department, in contemplation of law, if, as was said in 249 Fed. 562, the 5th section of the act of June 27, 1906 (34 Stat. 519, 520), forbade contests on the ground of abandonment and left the Land Department without jurisdiction to entertain contests upon that ground and, consequently, powerless to order and effect a valid cancellation.*

Opposing counsel will probably find it somewhat embarrassing to contend in Nos. 291 and 292 that the decision of this court of February 28, 1921, in No. 495 rules the decisions in Nos. 291 and 292. The embarrassment they cannot escape is this:

That if this court's said decision of February 28, 1921, is an actual concurrence in the views of the Court of Appeals in No. 495 as to the meaning of the act of 1906, *supra*, then, necessarily, the homestead entries which Fleischer and Ocheltree, the respondents in Nos. 291 and 292, respectively, contested and had canceled, were never contested and were never canceled, in contemplation of law and therefore, also in contemplation of law, were intact on the records of the Land Department on April 18 and May 18, 1910, and have been ever since, from which would follow a situation which opposing counsel will doubtless discuss more fully in their argument at the bar than they have in the briefs they filed on April 16, 1921.

It was in nowise essential to relief for Edwards under his bill of complaint, for the Court of Appeals to have passed upon the validity of the Interior Department's regulations of June 6, 1905, 33 L. D., 607, and of January 19, 1909, 37 L. D., 365. Edwards was afforded full relief under that court's views that the said act of 1906 relieved homstead entries from contest and that, because Edwards continued in occupancy of the land until after it was restored to settlement and entry on April 18, 1910, and May 18, 1910, respectively, it was unlawful for the Land Department to have allowed Bodkin to make entry. *Remembering that proposition, there will be agreement with us that this court's affirmance of February 28, 1921, in No. 495, may well be said to have affirmed only those rulings in law below which were essential to determination of that case below in favor of Edwards, and leaves still open for decision by this court the question whether it should approve and confirm the views of the Supreme Court of the State of California in Nos. 291 and 292 as to the effect in law of the said regulations of 1905 and 1909, respectively, or ratify and sustain the opposite views of the Circuit Court of Appeals (249 Fed. 562) as to the effect in law of the same regulations.*

V.

IN THE PETITION FOR REHEARING IN NO. 495, AS WELL AS HEREIN, WE SHOW PLAINLY THAT THE AFFIRMANCE IN NO. 495 WAS DUE ENTIRELY TO NOTHING ELSE BUT THE EASILY PROVEN, IF NOT NOW OBVIOUS, MISCONCEPTION THAT SAID CASE HAD BEEN PRESENTED HERE ON QUESTIONS OF FACTS.

At the outset of this chapter of our brief, we refer to the allusion in this court's opinion of February 28, 1921, to the fact that "under the appellant's specification of what should be included" in the record of No. 495 in this court, a part of the evidence in the courts below was omitted.

If it be true that this court has repeatedly decided, that the decisions of the Land Department are conclusive everywhere as regards all questions of fact.

If it be true that it is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of said department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.

If it be true that the findings of fact of officers of the Land Department cannot be reversed or corrected by the courts in a collateral proceeding between private parties.

If it be true that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final,

If the foregoing elementary and familiar principles of jurisprudence were undoubtedly in the minds of the courts below when they were considering the case which was No. 495 in this court,

May we not state it as an absolute fact, and for verification of such statement confidently refer to the language of the decisions below and to all the logical implications thereof, that none of the courts below revised, modified or changed a single finding of fact made by the Land Department in the Bodkin-Edwards contest?

May we not also state it as an absolute fact, and base such statement upon the same language and same implications of the same decisions, that *no court below made*

any finding of fact which is without its evidence in the record of No. 495 in this court?

May we not also state it as an absolute fact, and rest such statement upon said decisions and upon the contents of said record, that *there is set out in the record of No. 495 in this court all the evidence of every fact upon which every ruling below in a matter of law was based?*

If we are entitled to answers in the affirmative from this court to the foregoing questions, then, as we submit, *the record in No. 495 in this court was complete for all the purposes of an adjudication by this court under all the errors alleged in the assignment in No. 495.*

This court's opinions are reported and widely read. The reports thereof carry the names of counsel. Whatever lack of intelligence or diligence on the part of Bodkin's counsel in No. 495 was indicated by his withholding of answer to a motion to dismiss or affirm which motion, on its face, was utterly meritless, there can be no just inference that he painstakingly omitted from the record in No. 495 in this court matter which he deemed hurtful to his client's case and helpful to the case of his adversary.

Owing to the manner of the summarization in this court's opinion of February 28, 1921, of what it deemed to be the record shown facts in No. 495, it might be inferred that "Bodkin instituted a contest against the entry" *after, instead of long before,* Edwards submitted final proof. It is also remarked in such summarization that Edwards "submitted final proofs in due course."

The record shown facts are that the "final proofs" were submitted on April 23, 1909, *six years and four months after the making of the entry, about a year after there was service on Edwards of Bodkin's contest, about four months after the Register and Receiver rendered their decision that Edwards' entry should be cancelled*

on Bodkin's contest, and when the contest proceeding was on appeal to the General Land Office (R. 44 and 37 to 39).

It is remarked in the said opinion of this court that "the land officers then permitted Bodkin to make a homestead entry of the land, afterwards allowed him to relinquish that entry and make others of the same tract under soldier's additional rights of which he was the assignee," et cet. *When the court made the above remark it should have occurred to it, and we do not say that it did not, that when the Land Department had "permitted" and "allowed" as above stated, it was, presumptively, administering the law as it in good faith understood it and honestly believed it should be applied as between Bodkin and Edwards. It must be taken for granted that this court perceived that the litigation revolved about the question whether what was thus "permitted" and "allowed" was lawfully "permitted" and "allowed." But this court did not expressly pass upon the lawfulness of what was "permitted" and "allowed,"* ALTHOUGH THE ASSIGNMENT OF ERRORS ON THE APPEAL SOUGHT TO HAVE IT DO SO AND SOUGHT NOTHING MORE THAN AN EXPRESSION FROM IT ON MATTERS OF LAW EXCLUSIVELY.

The record in No. 495 shows that Bodkin's application to make homestead entry in the exercise of his preference right was filed May 18, 1910; that it was suspended for a reason not material here and that it was "permitted," or approved and an entry made thereunder, on June 1, 1912 (R. 55); that nearly two years thereafter, on March 6, 1914, Bodkin relinquished the entry *without abandoning the land*, for on the same date he filed or located the soldiers' additional rights (R. 59 et seq); that on December 23, 1914, and for the reasons set out in its decision of that date, the General Land Office "allowed," or au-

thorized final entry under, the soldiers' additional rights (R. 59 to 64); that, as set out in said decision and more fully shown in Wells v. Bodkin, 47 L. D., 288, what the General Land Office thus "allowed" was, in fact, something Bodkin felt he was required to do, and which he had the unquestionable right to do (as the Land Department duly adjudged he had), if he desired to exercise and enjoy the rights he and his wife became entitled to as the heirs of his unmarried daughter, Florence Bodkin, who died after acquiring a right under the homestead laws which passed to and vested in her heirs. *These facts,* NOT QUESTIONED BY EDWARDS OR ANYONE, *all appear in the record in No. 495. The views of the lower courts thereon as to their effect in law controlled the decisions of those courts.* THOSE VIEWS ARE DULY CHALLENGED IN THE ASSIGNMENT OF ERRORS IN NO. 495. SURELY THIS COURT, IF IT HAD NOT MISCONCEIVED THE TRUE CHARACTER OF NO. 495, WOULD NOT HAVE, COULD NOT HAVE, SAID THAT "THE CASE AS PRESENTED HERE TURNS ESSENTIALLY ON QUESTIONS OF FACT."

The so-called scrip selection by Bodkin seems to us to have unduly affected the minds of the courts below, possibly excited therein an unconscious leaning toward Edwards in the litigation. *But what if Bodkin had used the so-called scrip at the outset, and not until after he had resided upon the land for about two years under his homestead entry?* In other words, what would have been the effect in law of use of the so-called scrip on May 18, 1910, when Bodkin filed his homestead application to enter in exercise of his preference right as a successful contestant? Bodkin rested under no legal obligation to exercise that preference right by tendering a homestead

application. On May 18, 1910, the land was restored to entry under the general land laws, and therefore Bodkin could then have used the scrip, if he had so desired, *regardless of Edwards occupancy of the land at that time. If that proposition is not sound then there are other decisions and regulations of the Land Department that are obnoxious to law and the public interests, notably the decision of November 10, 1919, in Goodwin v. Goodin, 47 L. D., 298, wherein it was said:*

> "In the opinion of this Department none of the charges made in the protest justifies the rejection of Goodin's application to enter. Neither the settlement of Goodwin, which was made after the cancellation of the entry contested by Goodin, *nor her occupation of the land at the date of his application to enter,* defeated his preference right. (Hodges et al. v. Colcord, 24 L. D., 221; Thorbjornson v. Hindman, 38 L. D., 335; Arnold v. Burger, 45 L. D., 453.)
>
> "It is not contended that the soldiers' additional right here involved was not valid, or that it was not formally assigned to him, or that it would for any reason not support his entry, and the mere fact that he is not seeking the land for his own continued use and benefit does not forbid the allowance of his application and will not invalidate his entry. *He was not required to show that he was not seeking to make this entry for speculative purposes, as is the case with an applicant under the general provisions of the homestead laws. He gained a personal right and benefit by securing the cancellation of the former entry and it can not be said that he is guilty of fraud if he elects to utilize that right and benefit by entering the land and immediately transferring it to some other person.*"
>
> * * * * * *
>
> "In this case the title to the soldiers' right is held by Goodin himself. The entry will be his entry

> and in his name, and the patent will issue to and vest the title to the lands applied for in him." (Italics supplied.)

Another observation in this court's said opinion should be discussed here. It is that "Bodkin answered and the issues were tried." Did this court misconceive the mode of trial? Bodkin's answer is set out at pages 11 to 29 of the record. Its denials cast upon Edwards' proof of every allegation of fact in his bill of complaint which the Court of Appeals in 249 Fed. 562 had rendered material by its rulings on several matters of law. The proof Edwards offered was contained *in the agreed statement of facts* (R. page 30 to paragraph 28 on page 64), in the entire evidence taken in the contest proceeding in the Land Department, which was omitted from the record in this court (with the implied if not express, consent of Edwards and for the valid reasons set out in detail elsewhere herein), a portion of Bodkin's testimony in the contest proceeding (R. 64, 65), and the testimony by Edwards and one McFee which was taken in the District Court (R. 65 to 71). NO ATTEMPT WHATSOEVER WAS MADE BY BODKIN TO REBUT SUCH PROOF IN ANY RESPECT OR TO ANY EXTENT. Bodkin put into the record copies of the patents that issued to him and copies of pleadings and of notes of proceedings in possessory actions in the State Court which, for valid reasons stated elsewhere herein, were not carried into the record for this court.

We respectfully submit that from the foregoing it is manifest that no issues of fact were actually tried below; that there was no controversy below between the parties as to facts; *that, after the coming in of Edwards' colorable amended bill, Bodkin realized that Edwards would attempt to make no proof (and he did not) of any fact*

other than what might be essential as a basis for his becoming the beneficiary of those rulings in matters of law which the Court of Appeals made in 249 Fed. 562, and which Bodkin believed to be utterly unsound. IN SUCH CIRCUMSTANCES, WITH BODKIN CONTROVERTING NOTHING HIS ADVERSARY CHOSE TO PUT IN THE RECORD, BUT PLAINLY AND OF NECESSITY RELYING UPON THIS COURT TO REVIEW THE RULINGS IN 249 *Fed.* 562, WE VERY RESPECTFULLY SUBMIT THAT NO. 495 WAS IN THIS COURT ON QUESTIONS OF LAW EXCLUSIVELY.

Lest we fail of performance of our full duty to the court and to our clients, we ask the court's indulgence to comment on the following statement in its opinion of February 28, 1921, in No. 495, to wit:

> "The court found that the material allegations of the bill were true; that in proceedings before the Land Department matters presented by Edwards which should have been considered were not considered, and that in consequence the title was passed to Bodkin when it should have gone to Edwards."

Of course this court did not mean that the court below had found that Edwards had presented to the Land Department the matter of the alleged immunity of homestead entries from contest for abandonment, because of the 5th section of the act of June 27, 1906, 34 Stat. 519, 520, and that the department had neglected or refused to consider it. *But as a matter of fact the said statute is the only thing any court below found had not been considered by the Land Department.* No court below found that said department had not done what the record in this court in No. 495 plainly shows that it did, to wit, consider Ed-

wards' defense against Bodkin's contest, consider Edwards' application for second homestead entry, consider Edwards' application to contest Bodkin's entry, consider Edwards' motion for acceptance of his final proof, and consider the merits of Edwards' protest against the so-called scrip selection. (R. 37 to 43; 50, 53, 57, 58, 59, 71 and 73). No other matters than these were ever presented by Edwards to the Land Department for its consideration *and Edwards did not allege in his complaint that he had submitted other matters to the Land Department and that they were not considered by said department. What the courts below did clearly hold was that the Land Department had, after consideration, rejected Edwards' final proof when, if said department had not "misunderstood" or "overlooked" the said act of 1906, it would have accepted and approved it.*

This court was not at all specific or explicit as to what it had apprehended, upon review by it of the record in No. 495, were the matters of fact or of law which the courts below found "should have been considered," but "were not considered" by the Land Department. However, it must be assumed that this court, although not stating or describing those matters of fact or of law in its opinion of February 28, 1921, perceived their real existence and affirmed the decree below solely because such matters had not been considered by the Land Department. We beg leave to remark that we deem it very unfortunate that the language of this court's decision of February 28, 1921, leaves for conjecture what those matters were. *We do not know what they are. Surely they are not pointed out in this court's decision nor in any decision below. Therefore, we are left in the dark by the judiciary as to the precise default on the part of the Land Department which only the Supreme Court of the*

United States has made the basis for a decree of virtual transfer to Edwards of the property of Bodkin.

In concluding this chapter of our brief we very respectfully submit that No. 495 was not a case in this court in which there was express or implied agreement between the litigants as to the materiality of the allegations of the bill of complaint, a voluntary recognition by the plaintiff, under an answer to the bill and by denial of its averments, that a cause of action was stated, and that the granting of the relief prayed was dependent solely upon proof establishing the allegations of the bill. *Bodkin's answer to Edwards' complaint was enforced by the Court of Appeals' rulings in matters of law, 249 Fed. 562. From those rulings, and from them alone, the allegations of Edwards' bill became endowed with the merit of materiality. Bodkin not having raised any question below or here that called for any ruling other than one as to whether all the uncontroverted documentary evidence, and the testimony from witnesses, established facts which, in law, were sufficient to warrant the granting of the prayers of Edwards' bill, we submit that No. 495 was not of the class of cases which, although presenting Federal questions, will not, under the settled rule of this court which is referred to in its said opinion of February 28, 1921, be reviewed here on alleged errors having to do solely with the admissibility of evidence to establish facts.* IN SHORT, NO. 495 WAS NOT HERE FOR DECISION AS TO WHETHER FACTS WERE DULY IN PROOF, BUT WAS HERE FOR DECISION AS TO WHETHER SUCH FACTS AS THE COURTS BELOW STATED THEY FOUND, WERE SUFFICIENT IN LAW TO SUSTAIN THEIR RULINGS.

VI.

McLAREN AND CULPEPPER COULD HAVE LEARNED AT THE LAND OFFICE IN LOS ANGELES, BEFORE THEY MADE THEIR SETTLEMENTS, OF THE AWARDS OF PREFERENCE RIGHTS OF ENTRY TO FLEISCHER AND OCHELTREE.

That the land in suit was *surveyed* at all times mentioned in the bill of complaint, is a permissible deduction, if not an admitted fact, in this litigation. Another fact that may be deemed to be satisfactorily in proof is that Fleischer knew the description, in terms of the official surveys, of the lands in suit, on April 18, 1920, when he made settlement thereon. Obvious it is that he knew such description on May 18, 1910, when he filed his application for entry.

Persons who connect themselves with the surveyed public lands with view to asserting claims thereto, are chargeable with notice of what the official records in the appropriate local Land Office show, both as to the status of the lands and existing claims or rights with respect thereto. *McLaren could not have known on April 18, 1910, that the land in suit was surveyed* PUBLIC LAND, *unless he knew what the records in the appropriate local Land Office showed with respect to it.* Therefore, if McLaren did not know on April 18, 1910, that the land he settled upon on that date was subject to the preference right of entry which had been earned by and was *vested* in Fleischer, his ignorance in that regard cannot be helpful to him here, for, as is patent, Roe's ignorance of Doe's rights does not either destroy or diminish those rights or make them subject to, subordinate to and

inferior to an act done by Roe in ignorance of a fact of which he has knowledge because charged with knowledge by law.

The foregoing observations have been made only because of the possibility that this court might be asked, in the argument of opposing counsel, to decide against Fleischer and Ocheltree and for McLaren and Culpepper, owing to the fact that the order of restoration of the lands to the public domain did not state that some of the lands might be entered in the exercise of contestants' preference rights of entry. *While there is nothing in the pleadings to the effect that McLaren and Culpepper were misled by the notice of the order of restoration into the belief that the lands were free from all claims, and that the first settlers would acquire the first rights, and that, therefore, they made their settlements without notice of the said preference rights, it is not entirely impertinent to remark here that whether the order of restoration did or did not notify the public of the existence of such preference rights, no omission of any duty by any officer of the Land Department could have deprived Fleischer or Ocheltree of those rights.*

VII.

THE ULTIMATE AND ONLY REAL QUESTION IN NOS. 291 AND 292 WAS THE SAME ULTIMATE AND ONLY REAL QUESTION IN NO. 495, TO WIT, DID A SETTLEMENT UPON THE LAND WHICH WAS EXISTENT ON APRIL 18, 1910, DEFEAT THE PRE-EXISTENT PREFERENCE RIGHT WHICH WAS IMPOSSIBLE OF EXERCISE UNTIL MAY 18, 1910.

Now having done with the rulings of the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed. 562, so far as they were *controlling* below in No. 495, we will deal with those other rulings in that decision which it was wholly unnecessary for that court to make in view of its conclusion that Edwards entry never had been lawfully contested and never had been lawfully cancelled.

Is it true, as said court declared it was, that the department's regulations of June 6, 1905 (33 L. D., 607), were invalid because, in effect, and attempt by the Land Department to legislate, to amend the act of May 14, 1880, 21 Stat. 141? The question is a very serious one, for if the said court's views are sound many titles under many patents issued by the Land Department are in jeopardy.

When the Land Department withdraws lands it does so, presumably, in promotion of the public interests and in the exercise of a power Congress has granted it. *An order of withdrawal is the government's method of asserting a government claim to public land for the general good. It usually takes the form of a reservation of public lands from disposal pending legislation, or the determination of some question as to the character of the land or as to its value for governmental uses.*

The lands in suit were withdrawn under the Reclamation Act of June 17, 1902, 22 Stat. 388. The petitioner's bill of complaint does not aver the existence of any withdrawal prior to the "first form" withdrawal which, as alleged in the complaint, was made on September 8, 1903. A first form withdrawal—

> "embraces lands that may possibly be needed in the construction and maintenance of irrigation works

> and the other commonly known as 'withdrawals under the second form,' which embraces lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works." Instructions of June 6, 1905, 33 L. D., 607.

Thus it appears, that when a first form withdrawal is made, the government has concluded that it might find the lands described therein essential to *the construction* of a governmentally originated and conducted enterprise for the irrigation of public lands. *Therefore the lands described in such a withdrawal are lands which, presumably, the government desires to retain permanently in the ownership of the United States, in order that the government may use them, occupy them, and build and construct thereon works for the irrigation of other and nearby or contiguous lands. In short, such a withdrawal is made to prevent the initiation of claims to the land that might ripen into titles thereto, with resultant necessity on the part of the United States to re-acquire title through purchase or condemnation proceedings.*

Is it not a logical corollary of the foregoing that the government should desire, that the public interests should require, the extinguishment of any mala fide claims, which had been initiated before the withdrawal, or claims which were not being maintained in accordance with law?

> "Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which seregated and withheld the lands embraced therein from other forms of appropriation at the time of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which

they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes."

* * * * * *

"Any entry embracing lands included within any withdrawal, made upon either of the forms mentioned, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the Land Office fees occasioned by his contest will be awarded a preferred right of making entry under the reclamation act, provided the lands involved are not embraced within a withdrawal of the first form.

* * * * * *

"When any entry for lands embraced within a withdrawal under the first form is canceled by reason of contest, or for any other reason, such lands become subject immediately to such withdrawal and can not, thereafter, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preferred right to enter any such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry. (Italics supplied.)

"In the event any lands embraced in any entry under which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation work (other than for right of way for ditches or canals reserved under act of August 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements." Instructions of June 6, 1905, 33 L. D., 607, 608, and 609.

The government employs men, known as special agents, to assist in ridding the public lands of spurious claims thereto. But if the government depended exclusively upon them for that purpose, much more land would be obtained fraudulently than is obtained. We do not mean that the special agents are not efficient and faithful public servants, we mean only that there are not enough of them for a really protective patrol of the public domain. Congress has aided the government otherwise than by appropriations for such employes, in freeing lands from mala fide claims. It has provided an inducement and a reward to citizens for bringing to the notice of the government the existence of mala fide land claims.

The right of an individual to contest a homestead entry for failure on the part of the claimant thereunder to maintain it in accordance with law is found in the homestead statutes. (See section 2297, Revised Statutes.) However, it was not until enactment of the statute of May 14, 1880 (21 Stat. 140), that a reward for contesting the entry of a defaulting claimant was offered by the United States. Such reward is described in said Act of 1880, as follows:

> "That in all cases where any person has contested, paid the Land Office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the Land Office * * * of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands." (21 Stat. 140.)

As to the policy of the law of contest the following is quoted from Brown v. Brown and Moses v. Brown, (2 L. D., 259, 260):

> "You will also please notify the local officers that Congress has in various ways invited and encouraged persons to inform against those who are endeavoring to acquire title to the public land fraudulently or illegally, as the only adequate means of protecting the United States; and that it is their duty to further this policy by examining carefully any application to contest a claim, pointing out its defects to the applicant, and allowing him to amend it at once."

The preference right of entry referred to in the said act was defined in Strader v. Goodhue, 31 L. D., 137, 138.

The petitioners here challenge the lawfulness of administration under said act of 1880 with view to ridding lands within first form withdrawals of mala fide claims thereto. They will contend, necessarily, that the functions of the Secretary of the Interior, as "the supervising agent of the government to do justice to all claimants *and preserve the rights of the people* of the United States" (Knight v. U. S. Land Association, 142 U. S. 161, 178. Italics supplied), do not require or permit him to promulgate a regulation of promise to a successful contestant, that, if the United States decides it does not want the tract of public land which was embraced in the entry the contestant had canceled, such contestant will be notified accordingly and will be allowed to make entry of such land at any time within thirty days after it has been restored to the public domain.

Said regulation is valid or invalid accordingly as this court views the range of the lawful discretion of the Secretary of the Interior in administering under said act of 1880, which is manifestly legislation in promotion of the public interests, in that its object is aid to the government in safeguarding the public domain against mala fide en-

tries and fraudulent appropriations? That being its object, should it not be both administered and construed liberally in effectuation of its salutary purpose? Administration under it has ever been exclusively within the province of the Land Department which has administered thereunder liberally. Is it essential to the public interests, or demanded by any law, that its provisions be so construed by the judiciary as to prevent its employment by the Land Department in exterminating a pest, viz., the speculative homesteader, from lands covered by first form reclamation withdrawals?

It is a logical inference that a contestant would not institute his contest and defray the heavy expense incident to its prosecution (the act of May 14, 1880, supra, and the decisions and rules of the Land Department thereunder requiring contestants to meet all the expenses of the contests), unless induced to do so by the offer of that uncertain reward which was held out by the regulations of June 6, 1905, to wit, a preference of entry only in event the withdrawal was revoked. Certainly contestants accepted that offer in good faith. They relied, they thought, upon the United States, speaking through the Secretary of the Interior, to grant, and not withhold, that uncertain and contingent reward, if earned. In view of these circumstances was there not something of a contractual relation between the contestants and the United States after the former began their contests? *If that contractual relation was not forbade by law, it is certain that this court should not render a decision with respect to it which would cause the United States to assume the role of a repudiator.*

This contractual aspect of the preference right was referred to in Wells v. Bodkin, 42 L. D., 340, in these words:

"His contest carries with it, therefore, an incipient and inchoate statutory right of entry and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his, or is foreclosed by some interest of the Government or by limitation of the law. Neither the contestee nor any other person can, *by settlement or otherwise*, acquire any interest in the lands after initiation of the contest and prior to termination of the contestant's right of entry based by the statute thereon which is superior to such right in the contestant. Thorbjornson v. Hindman (38 L. D., 335)."

We shall say more concerning the said regulations of 1905, in connection with the ruling by the Court of Appeals, speaking through Circuit Judge Morrow, 249 Fed. 562, 569, "that whatever preferential right defendant had secured by his contest was terminated by the regulations of January 19, 1909," 37 L. D., 365.

In No. 291, as in No. 292, it is alleged that the first form withdrawal was made September 8, 1903. That was AFTER the original homesteader, Rider, in No. 291, and the original homesteader, Arnold, in No. 292, had made their respective entries. The contest against Rider was *initiated* on February 18, 1908. The contest against Arnold was *initiated* on January 30, 1908. The Rider entry was canceled, as a result of the contest, on January 28, 1909. The Arnold entry was canceled, as a result of the contest, on September 30, 1908. *All these dates are prior to January 19, 1909, except the date of cancellation of Rider's entry, which was nine days thereafter, or January 28, 1909. We call attention to these facts because, if the views of the Court of Appeals in 249 Fed. 562 are sound, Fleischer must lose in this court because*

the entry he contested was not canceled until after the regulations of January 19, 1919.

But obviously those views are as unsound so far as Nos. 291 and 292 are concerned, as they are so far as No. 495 are concerned, FOR IN ALL THREE CASES THE CONTESTS WERE NOT ALLOWED PRIOR TO THE WITHDRAWAL BUT THEREAFTER, AND THE REGULATIONS OF 1909 EXPRESSLY APPLY ONLY "WHERE A CONTEST HAS BEEN ALLOWED PRIOR TO SUCH WITHDRAWAL." See said 1909 regulations at page 365 of 37 L. D. THEREFORE SAID REGULATIONS HAVE NO APPLICATION IN NOS. 291 and 292.

While the 1909 regulations forbade the allowance *thereafter* of contests against entries of lands in first form withdrawals, its provisions as to the abatement of then pending contests were expressly limited to contests "allowed prior to such withdrawal." Why such regulations? Just a little thought will disclose the point of view of the officers who drafted those regulations, only to have them recalled after more scientific consideration. *A "first form" withdrawal is an adverse claim by the United States. The originators of the 1909 regulations thought more of that adverse claim by the United States than they did of the morality of just treatment of citizens whose contests, under the regulations of 1905, had been initiated and were in progress before the making of the first form withdrawal. They rather unwisely, if not arbitrarily, decreed that they would not permit a citizen who was perfectly willing to do so, to cancel a mala fide entry, with the reward for so doing dependent entirely upon the willingness of the government to abandon its adverse claim under the first form withdrawal, upon perceiving that the lands would not be needed for construction purposes and, therefore, might very properly be restored to*

the public domain for entry under the public land laws generally.

While not truly pertinent here, but certainly clearly indicative of the Land Department's realization that the regulations of 1909 were unwise, to the extent that they forbade future contests, the Instructions of August 24, 1912, 41 L. D., 171, and the Instructions of September 4, 1912, 41 L. D., 241, are cited for reference by the court. *Those instructions are now, and at all times since they were issued have been, in force and effect.*

For possible reference by the court for information as to the views of the Land Department on the basis of its claimed right to provide for contests against entries of land in a first form, or any form, withdrawal under the reclamation act, and to award preference rights to successful contestants, as well as to effectuate and safeguard those rights, see Beach v. Hanson, 40 L. D., 607; Edwards v. Bodkin, 42 L. D., 172; John T. Slaton, 43 L. D., 212; and Wells v. Fisher, 47 L. D., 288.

There is another contention the respondents will make which we should notice, viz, that the thirty day period for exercise of the preference right begins from date of cancellation of the entry, and that the preference right is forever lost, if the land continues in a first form withdrawal for more than thirty days thereafter. On that matter the Land Department, in John T. Slaton, supra, expressed these views:

> "The act of May 14, 1880 (21 Stat., 140), under which he gained such preference right, contemplates that notice of said right shall issue at a time when the land is subject to entry since time begins to run against the contestant from the date of such notice. Bassett v. Sunderlin (41 L. D., 437); Edwards v. Bodkin (42 L. D., 172)."

Have the foregoing views a basis in wise and lawful administration? The act of May 14, 1880, supra, does not command that the notice of the earned preference right shall be given forthwith upon cancellation of the entry. It says nothing as to the time of the giving of the notice, but does say that the successful contestant "shall be *allowed* thirty days from date of such notice to enter said lands." (Italics supplied.) What mockery and unfairness, what treachery, would inhere in any regulations of the Land Department, or in any provision of law, that required a person to be notified that he would be *"allowed"* to do what he could not do and what the law forbade any Land Department official to allow him to do.

If there is nothing express or implied in the act of 1880 that prohibits postponement of issue of the notice, or the postponement of the time of exercise of the preference right, until after it is possible for the government to permit actual enjoyment of such right, may this court condemn as unauthorized and unlawful a regulation of the Land Department that does nothing more than insure decent and fair treatment of a citizen who has, at his own expense, purged the Land Department records of a mala fide filing or entry?

In other words, is it possible that the judiciary may so far control the power of the Land Department in purely administrative matters as to say to it, that it shall not by its regulations fix any other time for the issuing of notice to a successful contestant than the date of cancellation of the entry he contested? What is said in United States v. MacDaniel, 7 Peters, 1-14, is illuminating in connection with the criticism by the Court of Appeals of the rule anent postponed preference rights. In said cited case these observations were made:

"A practical knowledge of the action of any one of the great departments of the Government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government."

VIII.

THE DEPARTMENT OF THE INTERIOR IS IN FACT A PUBLIC LAND "COURT", AND AS SUCH HAS AN INHERENT POWER, AND IT IS ITS DUTY, TO PRESCRIBE JUST SUCH REGULATIONS AS THE PETITIONERS ARE ATTACKING IN THIS COURT.

The Land Department is a species of court, a quasi-judicial tribunal. Its jurisdiction is only less extensive, territorially, than that of this court. The property and wealth within its jurisdiction and the number of litigants that come before it are larger and more numerous, respectively, than the property and wealth and the litigants that come within the scope of the powers of many courts. In United States v. Schurz, 102 U. S., 167, it was said:

"The Constitution of the United States declares that Congress shall have power to dispose of and

make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior.

"To aid him in the performance of this duty, a bureau has been created at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress has confided the execution of the laws which regulate the surveying, the selling and the general care of these lands."

In Low et al. v. Katalla Company, 40 Land Decisions, 539, it was said:

"The Interior Department is specifically authorized and empowered to enforce and execute the public land laws of the United States. Sections 441, 453, 2478, revised statutes. The Land Department is a quasi-judicial tribunal and has exclusive jurisdiction over the disposition of lands of the public domain in the absence of specific legislation to the contrary. Bishop of Nesqually v. Gibbon (158 U. S. 155); Knight v. United States Land Association (142 U. S. 616); McDaid v. Oklahoma (150 U. S., 209)."

In a very large measure the Land Department is independent of the judiciary, for instance:

"The decisions of the proper officers of the land department on questions of fact in a contest is conclusive on the courts and, in the absence of fraud in preventing a party from presenting his case, the decision is not subject to review by the courts by a charge of perjury against the witnesses." (Syllabus of opinion in Estes v. Timmons, 199 U. S. 391.

This court must concede, of course, the *inherent* power of so important an agency of government as the Land De-

partment to make rules and regulations. (Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 301; Lytle v. Arkansas, 9 How. 314.) Not so to concede would be but to question the *inherent* power of the courts to establish rules of practice, as to all practical intents and purposes the Land Department, although a part of the executive branch of the government and controlled by executive and political officers, is nevertheless a court for the trial of public land cases, as under existing laws public land controversies are not possibly triable elsewhere.

CONCLUSION.

This court's decision of February 28, 1921, in No. 495 does not rule its decisions in Nos. 291 and 292. Our reason for this statement is that, in No. 495 the affirmance was, necessarily, as we have fully demonstrated hereinbefore, an approval of a decree below that was granted solely upon the alleged ground, upon what we deem to be the clearly untenable legal proposition, that the 5th section of the act of June 27, 1906, supra, relieved entries of lands within reclamation withdrawals from contests upon the ground of abandonment. *With that statute this court will not need to deal in reaching its conclusions in 291 and 292, unless, of course, it should hold that by reason thereof the Rider entry, which Fleischer (No. 291) contested, and the Arnold entry, which Ocheltree (No. 292) contested, were never lawfully canceled.*

Our final word is this: We have labored to our utmost, we have given all and the best we have, we trust that our contentions will be accepted in the spirit in which they have been made, in that spirit of earnestness and devotion in service to this court which is that of a citizen more interested in the cause of justice under the law than in himself, and far more deeply concerned about his duty to this

court than about success in a case in this court. It is submitted that the concurring opinions below in Nos. 291 and 292 are correct and, therefore, that the judgments based thereon should be sustained and affirmed.

Respectfully,

PATRICK H. LOUGHRAN,
Mills Building, Washington, D. C.,
Attorney for the Respondents in Nos. 291 and 292.

Due service of the within and receipt of two copies thereof, are hereby admitted this ..... day of April, 1921.

....,
Attorney for the Petitioners in Nos. 291 and 292.